Supreme Court, U. S.
FILED
JUL 4 1977
MICHAEL RODAK, JR., CLERK

CORRECTED COPY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-811

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioners,

VS.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE FAIR EMPLOYMENT PRACTICE COMMISSION OF THE STATE OF CALIFORNIA, AMICUS CURIAE

CHARLES E. WILSON,
LEONORA M. STOPOL,
FERNANDO GARCIA,
WILLIAM H. HASTIE, JR.,
Fair Employment Practice Commission,
Post Office Box 603,
San Francisco, California 94101,
Attorneys for the Amicus Curiae.

Dated, June 1, 1977.

Corrected June 21, 1977.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

	Page
Table of Authorities Cited	i
Interest of Amicus Curiae	1
Summary of Argument	4
Argument	5
I	
The admission decisions and policies of medical schools such as the University of California at Davis represent a virtually absolute control of access to professional employment as a physician	5
II	
Consideration of race and ethnicity as found in the medical school admissions program is not per se unconstitutional and should be permissible in the context of a remedial and benignly conceived program which was carefully circumscribed to minimize any harmful effects	7
III	
The alternatives to special selection programs posed by the California Supreme Court fail to meet the need; the current voluntary program represents an efficient and timely mechanism for insuring meaningful access of minorities to the profession and should be permissible if conceived and operated in a carefully circumscribed fashion	15
Conclusion	20

Table of Authorities Cited

Cases	Pages
Adams v. Rankin County Bd. of Ed., 485 F.2d 324 (5th Cir. 1973)	8
Asbestos Workers, Local 53, v. Vogler, 407 F.2d 1047 (5th Cir. 1969)	8
Bakke v. Regents of the University of California, 18 Cal.3d 34 (1976)	7, 8, 15
Bolling v. Sharpe, 347 U.S. 497 (1954)	10

	Pages
Boston Chapter, N.A.A.C.P. v. Beecher, 504 F.2d 1017 (1st Cir. 1974)	8
Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 482 F.2d 1333 (2nd Cir. 1973)	8
Brown v. Bd. of Ed., 347 U.S. 483 (1954)	10, 14
Buckner v. Goodyear Tire & Rubber Co., 476 F.2d 1287 (5th Cir. 1973), aff'g 339 F.Supp. 1108 (N.D. Ala. 1972)	8
Caddo Parrish School Bd. v. United States, 389 U.S. 840 (1967)	8
Carter v. Gallagher, 452 F.2d 315 (9th Cir. 1972), cert. denied 406 U.S. 950 (1972)	11
Castro v. Beecher, 386 F.Supp. 1281 (D.C. Mass. 1975) (on remand from 1st Cir. 459 F.2d 725)	9
Commonwealth of Pennsylvania v. O'Neill, 473 F.2d 1029 (3rd Cir. 1973) (en banc), aff'g in relevant part, 348 F.Supp. 1084 (E.D. Pa. 1972)	8
Commonwealth of Pennsylvania v. Sebastian, 480 F.2d 917 (3rd Cir. 1973), aff'g 368 F.Supp. 854 (W.D. Pa. 1972)	8
Dunn v. Blumstein, 405 U.S. 330 (1972)	7
EEOC v. American Telephone and Telegraph, ___ F.2d ___ (3rd Cir. 1977) 14 EPD ¶7506	12
EEOC v. Lithographers and Engravers, Local 2P, 11 EPD ¶10,735 (D.C. Md. 1975)	9
Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974)	8
Germann v. Kipp, ___ F.Supp. ___, 14 EPD ¶7504 (W.D. Mo. 1977)	13
Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972)	8
Keyes v. School Dist. No. 1, Denver, 521 F.2d 465 (10th Cir. 1975)	8
Korematsu v. U.S., 322 U.S. 214 (1944)	7
League of United Latin American Citizens v. City of Santa Ana, 410 F.Supp. 873 (C.D. Calif. 1976)	9
Lee v. Macon County Bd. of Ed., 453 F.2d 1104 (5th Cir. 1971)	8
Mancari v. Morton, 417 U.S. 536 (1974)	10
McLaurin v. Columbia Municipal Separate School Dist., 478 F.2d 348 (5th Cir. 1973)	8
Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975)	11

	Pages
Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), cert. denied 406 U.S. 950 (1972)	8
NAACP and United States v. Allen, 493 F.2d 614 (5th Cir. 1974)	8, 9
Porcelli v. Titus, 431 F.2d 1254 (3rd Cir. 1970), cert. denied 402 U.S. 944 (1971)	9
Puntolillo v. New Hampshire Racing Commission, et al., 375 F.Supp. 1089 (D.N.H. 1974)	6
Rios and United States v. Steamfitters, Local 638, 501 F.2d 622 (2nd Cir. 1974)	8
Schaefer v. Tannian, 7 EPD ¶9404 (E.D. Mich. 1974)	9
Shield Club v. City of Cleveland, 370 F.Supp. 251 (N.D. Ohio 1972)	9
Sibley Memorial Hospital v. Wilson, 448 F.2d 1338 (D.C. Cir. 1973)	6
Singleton v. Jackson, Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1969) (en banc)	8
Stamps and United States v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973), aff'd in relevant part, 515 F.2d 301 (6th Cir. 1975), cert. filed 1975	9
United Jewish Organizations of Williamsburg v. Carey, ___ U.S. ___, 45 U.S.L.W. 4221 (March 1, 1977)	14
United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971)	12
United States v. Central Motor Lines, 338 F.Supp. 352 (W.D.N.C. 1971)	9
United States v. City of Chicago, 416 F.Supp. 788 (N.D. Ill. 1976), aff'd ___ F.2d ___ (7th Cir. 1977)	9
United States v. Jefferson County Bd. of Ed., 372 F.2d 836 (5th Cir. 1966), aff'd en banc 380 F.2d 385 (1967), cert. denied sub nom. Caddo Parrish School Bd. v. United States, 389 U.S. 840 (1967)	8
United States v. Lee Way Motor Freight, Inc., 7 EPD ¶9066 (W.D. Okla. 1973)	9
United States v. Ironworkers, Local 10, 6 EPD ¶8735 (W.D. Mo. 1973)	9
United States v. Sheet Metal Workers, Local 10, 3 EPD ¶8068 (D.N.J. 1970) (preliminary injunction), 6 EPD ¶8715, ¶8717 (D.N.J. 1973) (final order)	9

Pages

United States v. Lathers, Local 46, 471 F.2d 408 (2nd Cir. 1973), cert. denied 412 U.S. 939 (1973) 8
United States v. Ironworkers, Local 86, 443 F.2d 544 (9th Cir. 1971), cert. denied 404 U.S. 984 (1971), aff'g 315 F.Supp. 1202 (W.D. Wash. 1970) 8
United States v. IBEW, Local 212, 472 F.2d 634 (6th Cir. 1973) 8
United States v. IBEW, Local 357, 356 F.Supp. 104 (D. Nev. 1972) 9
United States v. Masonry Contractors Ass'n of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974) 8
United States v. United States Steel Corp., 5 EPD ¶8619 (N.D. Ala. 1973) 9
Vulcan Society of New York City Fire Dept. v. Civil Service Commission of New York, 490 F.2d 387 (2nd Cir. 1973) 8

Codes

California Business and Professions Code, §2168 5
California Labor Code:
§§1410, et seq. 1
§1412 2
§1420 2

Constitutions

United States Constitution:
Fifth Amendment 10
Fourteenth Amendment 9

Rules

United States Supreme Court Rules, Rule 42(2) 1

Statutes

42 U.S.C. §1983 9
Title VII, 1964 Civil Rights Act, as amended, 42 U.S.C. §§2000e et seq. 5, 6, 12, 14
Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973 et seq. 14

Texts

Knauss, Developing a Representative Legal Profession, 62 A.B.A.J. pp. 591, 593 (1976) 5

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-811

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioners,

vs.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE FAIR EMPLOYMENT PRACTICE COMMISSION OF THE STATE OF CALIFORNIA, AMICUS CURIAE

INTEREST OF AMICUS CURIAE[1]

The Amicus Curiae, the Fair Employment Practice Commission, is an official governmental entity of the State of California created in 1959 pursuant to the Fair Employment Practice Act, California Labor Code §§1410, *et seq.* The enactment of the Fair Employment Practice Act was a recognition by the legislature that discrimination in employment against various groups is a grave problem plaguing society.

[1]Letters from counsel for the parties to this action, which consent to the filing of the Brief for the Amicus Curiae, have been filed with the Clerk of the Court pursuant to the U. S. Supreme Court Rule 42(2).

The jurisdiction of the Fair Employment Practice Commission, sometimes hereinafter referred to as the Commission, has been expanded beyond the area of employment and now extends to the prevention and elimination of discrimination in housing and public accommodations and to the conciliation of community disputes born of discriminatory practices. While the issues before the court in this case do not arise from the factual context of a traditional employer-employee or employer-applicant relationship, the instant matter has critical import to the work of the Commission both in pursuit of its general mandate—the prevention and elimination of discrimination in employment—and in carrying out one of its specific charges—the barring of unnecessary and unlawful discrimination in the *access* to employment opportunity.[2]

The inter-relationship between education and employment opportunity, particularly in specialized

[2]Specifically, the California statute speaks of "The opportunity to seek . . . employment without discrimination . . . is hereby recognized as and declared to be a civil right.", §1412 California Labor Code, and provides in part as follows:

> 1420. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: . . .
> (c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of the person discriminated against.

professional areas such as medicine, is undeniable. Membership in the medical profession is virtually impossible absent access to and successful participation in a full and accredited medical school program. Thus, the decision of a medical school as to whether or not to grant admission to an individual can, and often does, have the effect of completely excluding that person from a professional employment opportunity. Moreover, the selection practices and decisions made in the admission process and the array and type of factors on which that process is based are highly analogous in substance and concept to many pre-employment selection situations in the traditional employment context.

While the Commission is deeply concerned about the immediate effect that the California Supreme Court decision will have on the access of ethnic minorities to the medical profession, an equally important interest is present in the potentially decimating effect that decision will have on the future of voluntary affirmative action by employers.

Finally, it should be noted that the Commission recognizes the number of other Amici Curiae submissions and the detail of briefing submitted to this court will result in exhaustive and possibly redundant argument. In light of this, the following brief will simply confine itself to highlighting a few of the issues particularly important to this Amicus Curiae, the inter-relationship of employment law to this issue, some brief analysis of the fundamental legal issue, and review of the legitimacy or illegitimacy of alternative approaches.

SUMMARY OF ARGUMENT

(1) The operation or impact of the admissions policy of a major medical school directly affects and almost absolutely controls access to professional employment opportunity as a physician. Therefore, legal scrutiny of any such program must necessarily involve consideration of employment discrimination implications.

(2) Consideration of race or ethnicity in governmental action is not *per se* prohibited under the Constitutional and statutory decisions of this court. This is particularly so where the official action, like the medical school's special admission program, was remedial in nature, was benignly conceived to meet a compelling public policy need, and was so circumscribed as to avoid the type of invidious discrimination which the courts have specifically forbidden.

(3) Special admission programs like the one at issue here represent the most efficient and timely mechanism for insuring a meaningful access of ethnic minorities to the medical profession. The alternatives offered by the majority opinion below are impractical, inapplicable, and speculative. Adherence to a few sound guidelines of limitation should render special or preferential selection programs permissible.

ARGUMENT

I

THE ADMISSION DECISIONS AND POLICIES OF MEDICAL SCHOOLS SUCH AS THE UNIVERSITY OF CALIFORNIA AT DAVIS REPRESENT A VIRTUALLY ABSOLUTE CONTROL OF ACCESS TO PROFESSIONAL EMPLOYMENT AS A PHYSICIAN

Successful matriculation from an approved medical school is a prerequisite to licensing as a physician in California, §2168 California Business and Professions Code, as it is in most states. It is self-evident that, in almost all instances, absent an opportunity to attend such a school, a career as a physician is precluded. Since only a small number of those seeking admission to accredited medical schools like U.C. Davis can be accepted, the control and outcome of the decision as to admission is, in itself, determinative of the career opportunity.

In the related context of admission to law school, one commentator has noted:

> "A student denied admission to law school is virtually denied admission to the profession. In 1974, more than thirty-three thousand persons were admitted to practice, of whom only four prepared by law office study."

Knauss, *Developing a Representative Legal Profession,* 62 A.B.A.J. 591, 593 (1976).

The lower Federal Courts have, in generally comparable situations, held that control of access to employment opportunities represents an employment practice within the meaning of the principal federal employment discrimination statute, Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §§2000e

et seq. In *Puntolillo v. New Hampshire Racing Commission, et al.,* 375 F.Supp. 1089 (D.N.H. 1974), the district court held a state licensing agency and racing association were proper defendant "employers" under Title VII because they controlled the plaintiff driver-trainer's access to employment opportunity, even though the harness horse owners were the traditional employers of the driver-trainers. *Sibley Memorial Hospital v. Wilson,* 448 F.2d 1338 (D.C. Cir. 1973), similarly held an action could be maintained under Title VII against a hospital which referred plaintiff nurses by a registry system to patients requesting such services. The patients, concededly, were the direct employers, but the hospital was held to exercise control of access to the employment opportunity.

In light of the foregoing, we think it is but a short analytical step to acknowledge the kindred application of the principles evolved in employment discrimination law under Title VII and related state statutes to the subject situation where the university medical school controls access to the medical profession. The California Supreme Court essentially and erroneously rejected this formulation; in so doing, it was also able to reject the well-developed analytical tests under Title VII that might have raised substantial questions about the university's "traditional" selection criteria. The Commission believes that only after this framework is adopted, can a voluntary special admission program of the nature challenged here be properly judged as to its legality.

II

CONSIDERATION OF RACE AND ETHNICITY AS FOUND IN THE MEDICAL SCHOOL ADMISSIONS PROGRAM IS NOT PER SE UNCONSTITUTIONAL AND SHOULD BE PERMISSIBLE IN THE CONTEXT OF A REMEDIAL AND BENIGNLY CONCEIVED PROGRAM WHICH WAS CAREFULLY CIRCUMSCRIBED TO MINIMIZE ANY HARMFUL EFFECTS

It has been well established by this court that where a classification is one which has been denominated by the court to be "inherently suspect" or the individual interest affected is a fundamental constitutional right, the court must determine whether the classification or exclusion is necessary to promote a compelling state interest. *Dunn v. Blumstein,* 405 U.S. 330 (1972). Equally fundamental is the principle that classifications based on race are inherently suspect and carry a very heavy burden of justification, *see, e.g., Korematsu v. U.S.,* 322 U.S. 214 (1944).

But, every classification by race is not odious. While as a threshold matter such are at least suspect, they can be justified. As the California court recognized in the case of such racial classification, not only must its purpose serve a compelling state interest, but it must be demonstrated that there are no reasonable alternative ways to achieve the state's goals which impose a lesser limitation on the rights of the group disadvantaged by the classification. *Bakke v. Regents of the University of California,* 18 Cal.3d 34 (1976).[3] However, classifications by race are not per se unconstitutional and have been upheld where

[3]The modification to the California Supreme Court's opinion is reported at 18 Cal.3d 252 b. However, the modification does not affect any of the points raised in this brief.

the purpose has been to benefit rather than to disable minority groups. *Bakke, supra,* at 46.

Race conscious remedies have also been developed and ordered to remedy school desegregation[4] and have also been formulated and validated by the courts in a variety of other situations.[5]

---

[4]*See, e.g., United States v. Jefferson County Bd. of Ed.,* 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (1967) *cert. denied sub nom. Caddo Parrish School Bd. v. United States,* 389 U.S. 840 (1967); *Keyes v. School Dist. No. 1, Denver,* 521 F.2d 465, 475-77 (10th Cir. 1975); *Kelly v. Guinn,* 456 F.2d 100, 110 (9th Cir. 1972). Race consciousness is also utilized in hiring of teachers and replacement of those displaced by desegregation orders. *Adams v. Rankin County Bd. of Ed.,* 485 F.2d 324 (5th Cir. 1973); *Lee v. Macon County Bd. of Ed.,* 453 F.2d 1104 (5th Cir. 1971); *McLaurin v. Columbia Municipal Separate School Dist.,* 478 F.2d 348 (5th Cir. 1973); *United States v. Jefferson County Bd. of Ed., supra; Singleton v. Jackson, Municipal Separate School Dist.,* 419 F.2d 1211 (5th Cir. 1969) *(en banc.).*

[5]The following myriad of cases represent only *some* of the other cases where such relief has been ordered: *United States v. Ironworkers, Local 86,* 443 F.2d 544, 553-54 (9th Cir. 1971), *cert. denied,* 404 U. S. 984 (1971), *aff'g* 315 F.Supp. 1202, 1247 (W.D. Wash. 1970); *Boston Chapter, N.A.A.C.P. v. Beecher,* 504 F.2d 1017 (1st Cir. 1974); *Franks v. Bowman Transportation Co.,* 495 F.2d 398 (5th Cir. 1974); *Morrow v. Crisler,* 491 F.2d 1053 (5th Cir. 1974) *(en banc), cert. denied,* 406 U.S. 950 (1972); *United States v. IBEW, Local 212,* 472 F.2d 634, 636 (6th Cir. 1973); *United States v. Masonry Contractors Ass'n of Memphis, Inc.,* 497 F.2d 871, 877 (6th Cir. 1974); *United States v. Lathers, Local 46,* 471 F.2d 408, 413 (2nd Cir. 1973), *cert. denied* 412 U.S. 939 (1973); *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission,* 482 F.2d 1333, 1340-41 (2nd Cir. 1973); *Vulcan Society of New York City Fire Dept. v. Civil Service Commission of New York,* 490 F.2d 387 (2nd Cir. 1973); *Rios and United States v. Steamfitters, Local 638,* 501 F.2d 622 (2nd Cir. 1974); *Commonwealth of Pennsylvania v. Sebastian,* 480 F.2d 917 (3rd Cir. 1973), *aff'g* 368 F.Supp. 854, 856 (W.D. Pa. 1972); *Commonwealth of Pennsylvania v. O'Neill,* 473 F.2d 1029, 1031 (3rd Cir. 1973) *(en banc), aff'g in relevant part,* 348 F.Supp. 1084 (E.D. Pa. 1972); *Asbestos Workers, Local 53 v. Vogler,* 407 F.2d 1047, 1104 (5th Cir. 1969); *Buckner v. Goodyear Tire & Rubber Co.,* 476 F.2d 1287 (5th Cir. 1973), *aff'g* 339 F.Supp. 1108, 1125 (N.D. Ala. 1972); *N.A.A.C.P. and*

The Court of Appeals for the Third Circuit has validated preferential hiring in *Porcelli v. Titus,* 431 F.2d 1254 (3rd Cir. 1970), *cert. denied,* 402 U.S. 944 (1971), an action brought by white teachers against a school board pursuant to 42 U.S.C. 1983 and the Fourteenth Amendment alleging discrimination due to the suspension of an appointment list and suspension of appointments from that list. Instead of appointing directly from the list, the board appointed qualified blacks to the faculty in response to a change in the racial make-up of the school system. Color was considered as one factor and the fact was fully admitted by all parties. The Court of Appeals rejected white plaintiffs' contentions that this suspension of the promotional list was a violation of their constitutional rights under the Fourteenth Amendment. The court stated, "state action based partly on considerations of color, when color is not used per se, and in fur-

---

United States v. Allen, 493 F.2d 614, 617-22 (5th Cir. 1974); *Shield Club v. City of Cleveland,* 370 F.Supp. 251 (N.D. Ohio 1972); *League of United Latin American Citizens v. City of Santa Ana,* 410 F.Supp. 873 (C.D. Cal. 1976); *Schaefer v. Tannian,* 7 E.P.D. ¶9404, at 7798 (E.D. Mich. 1974) (Sex discrimination); *United States v. Sheet Metal Workers, Local 10,* 3 EPD ¶8068, at 6191 (D.N.J. 1970) *(preliminary injunction),* 6 EPD ¶8715, at 5157, ¶8717, at 5177 (D.N.J. 1973) *(final order); United States v. IBEW, Local 357,* 356 F.Supp. 104 (D. Nev. 1972); *United States v. Ironworkers, Local 10,* 6 EPD ¶8735 (W.D. Mo. 1973); *United States v. Central Motor Lines,* 338 F.Supp. 352, 563 (W.D.N.C. 1971); *Stamps and United States v. Detroit Edison Co.,* 365 F.Supp. 87 (E.D. Mich. 1973), *aff'd in relevant part,* 515 F.2d 301 (6th Cir. 1975), *cert. filed* 1975; *United States v. United States Steel Corp.,* 5 EPD ¶8619 (N.D. Ala. 1973); *United States v. Lee Way Motor Freight, Inc.,* 7 EPD ¶9066 (W.D. Okla. 1973); *EEOC v. Lithographers and Engravers, Local 2P,* 11 EPD ¶10,735 (D.C. Md. 1975); *United States v. City of Chicago,* 416 F.Supp. 788 (N.D. Ill. 1976) *aff'd,* ..... F.2d ..... (7th Cir. 1977); *Castro v. Beecher,* 386 F. Supp. 1281 (D.C. Mass. 1975) (on remand from 1st Cir. 459 F.2d 725).

therance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment." Here, also, because all applicants deemed eligible for the special admissions program were determined qualified *before* selection for admission, race can not be isolated as the only factor in that process.

Equally telling is the fact that school integration is undeniably a proper state objective, *see Brown v. Bd. of Ed.*, 347 U.S. 483 (1954). In the situation presently before this court not only is the integration of the school itself at stake, but also the integration of the medical profession. As emphasized earlier, virtually the only way to enter the medical profession is through educational institutions such as the university.

Recently, in *Mancari v. Morton*, 417 U.S. 536 (1974), this court upheld the constitutionality of a federal statute against a claim that it violated the Fifth Amendment in granting hiring preferences for a race, American Indians, within the Bureau of Indian Affairs. The court noted that Congress was aware that the proposed preference would result in employment disadvantages to non-Indians within the BIA. Nevertheless, the holding was that the Indian preference did not constitute invidious racial discrimination in violation of the due process clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497 (1954). While in *Mancari*, the unique relationship of Congress with Indians was pointed out, as was the unique "debt" of the American people, the Commission submits that the governmental interest is equally strong

in situation presently at issue. Professions, such as medicine, have traditionally been overwhelmingly populated by white males; that this is in part a result of an historical pattern of slavery, involuntary servitude and peonage needs no citation. The University of California is not isolated from society and, as a public institution, it had a compelling governmental interest in integrating its medical school and creating meaningful access to educational and professional opportunities for groups who have previously been discouraged, excluded, and "disqualified" in percentages grossly disproportionate to their numbers.

Special admission programs such as the one at issue are essentially remedial and are designed to make victims of past discrimination whole. In employment discrimination cases, the courts have addressed themselves to the fact that in both the jurisprudence of torts and discrimination law the basic objective of damages is the same, to make the injured party whole to the extent that it can be done, *see, e.g., Meadows v. Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975). The object of corrective action in discrimination cases is to place the parties in the position they would have been but for the discrimination. The presence of identified individual persons who have been discriminated against has not been a necessary prerequisite to ordering affirmative relief to eliminate the present effects of past discrimination. *Carter v. Gallagher*, 452 F.2d 315, 330 (9th Cir. 1972) *cert. denied*, 406 U.S. 950 (1972). In situations where individuals who were the victims of past discrimination are not readily identi-

fiable, class relief is the proper remedy. *U.S. v. Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971).

Special admission programs constitute a form of class relief. The purpose of special admission programs is to place minorities or other victims of discrimination in the place they would have been but for a history of societal discrimination. Justifications for affirmative action are equally persuasive whether or not the particular institution has been guilty of or admits discrimination in the past. Although some beneficiaries of the affirmative action programs may not as individuals have been direct victims of past discrimination by the managers of the program, minorities as a class have been categorized and victimized throughout and at all levels of society. Thus affirmative and corrective action in such instances is a form of class relief.

An argument which has been raised by defendants in the context of Title VII cases is that relief can be provided only to identifiable members of specific past discrimination. This argument was recently rejected in *EEOC v. American Telephone and Telegraph,* ..... F.2d ....., (3rd Cir. 1977) 14 EPD ¶7506, affirming the approval of a consent decree which was designed to benefit the class of persons who were found to have been underutilized in a discriminatory pattern and practice. We submit that the university, in implementing its special program, had an interest, avowed or not, in benefiting a class of persons who had been excluded from participation in the public medical education which the University of California system provides.

In addition, as a comprehensive educational system, the university must bear responsibility for the historical absence and exclusion of minorities from undergraduate educational opportunities. For the reasons stated above, the Commission wishes to emphasize the remedial nature and context of these programs.

As stated earlier, consideration of race or ethnicity in governmental action is not per se prohibited. Moreover, a specific "finding" of past discrimination is not required as a pre-requisite. In a recent case, *Germann v. Kipp,* ..... F.Supp. ....., 14 EPD ¶7504 (W.D. Mo. 1977) a District Court addressed itself to the issue of whether affirmative action can be taken on a voluntary basis, absent a judicial finding of past discrimination. The court stated that after a finding of past discrimination, a court, in the exercise of its broad equitable power, *can* compel implementation of an affirmative action plan including quota relief. However, the court noted in its decision upholding a voluntary plan that the foregoing proposition does not mandate the opposite conclusion that an employer may not voluntarily implement a reasonable short-term affirmative action plan to remedy the effects of historical discrimination.

In the context of a voting rights case decided during the current term, this court has faced the argument that even if racial considerations might be used to remedy the residual effects of past unconstitutional reapportionments, absent specific findings of prior discrimination in New York, the state cannot

justify the affirmative remedy of reassigning white voters to increase the size of black majorities in certain districts. In response, this court stated that "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportioning." *United Jewish Organizations of Williamsburg v. Carey,* ..... U.S. ....., 45 U.S.L.W. 4221 (March 1, 1977). While the stated basis of the decision in that case is the Voting Rights Act, 42 U.S.C. §§1973 *et seq.,* the considerations are equally applicable in the case at bar. If the court were to hold that a finding of discrimination is required prior to taking voluntary affirmative action, it would be a tremendous setback to the progress that has been made in the area of employment discrimination and would severely hinder any future attempts to eradicate discrimination in other areas. We submit that such a result would clearly frustrate the purposes and intent of Title VII and other remedial federal statutes and orders, as well as state statutes such as the California Fair Employment Practice Act.

Finally, it should be recognized that the special program at issue in this case was implemented with the intent to remedy past exclusion and increase access, and was not implemented with invidious intent to discriminate even if in operation it indirectly infringes on the rights of non-minorities. As invidious discrimination occurs only if the classification excludes, disadvantages, isolates or stigmatizes a minority or is designed to segregate the races, *Brown v. Bd. of Ed., supra,* in the present situation none of the stated concerns are present; quite the con-

trary, the program is tailored to alleviate such concerns. An emerging theory in this field postulates that where a member of the dominant majority who complains of so-called "reverse discrimination" cannot show that the discrimination is racially disparaging, demeaning, insulting or even discriminatory as to the majority *group,* though it is damaging to him, such complainant cannot show that it tends to keep his racial group in or relegated it to a subordinate position in our society. Thus under this approach, there is simply no unlawful discrimination present against the respondent here.

III

THE ALTERNATIVES TO SPECIAL SELECTION PROGRAMS POSED BY THE CALIFORNIA SUPREME COURT FAIL TO MEET THE NEED; THE CURRENT VOLUNTARY PROGRAM REPRESENTS AN EFFICIENT AND TIMELY MECHANISM FOR INSURING MEANINGFUL ACCESS OF MINORITIES TO THE PROFESSION AND SHOULD BE PERMISSIBLE IF CONCEIVED AND OPERATED IN A CAREFULLY CIRCUMSCRIBED FASHION

In the decision below, the majority of the California Supreme Court suggested that the Petitioner had alternative procedures available which could accomplish the basic goals of the special admissions program with a less detrimental impact to the rights of the majority group, 18 Cal.3d at 53-57. The alternatives mentioned are not alternatives but really unfounded speculation that bear little relation to realistic or workable options for the future. The suggested alternatives were three—increasing the number of first year medical

positions available, instituting a more aggressive affirmative recruiting program, and operating a program which, in both intent and effect, benefits "disadvantaged" students of all races. These are discussed in order below.

Increasing medical school positions is a seductive idea and, in the abstract, the sheer enormity of demand for such slots supports that proposal. However, unless the court intended a six or seven-fold expansion in medical school size, such growth will do little to insure the meaningful access of minorities to the medical profession, while the admissions decision continues to be controlled by traditional criteria. The tremendous number of applications, originated in overwhelming number by students of majority origin, is just one of the factors precipitating special admissions. The severe gap between minority and majority performance when measured and relatively ranked by traditional selection standards is the second factor. This gap is such that a doubling, tripling or even quadrupling of the medical school student body size is, based on actual experience, unlikely to cause any real increase in minority presence beyond the symbolic level. Moreover, from a very practical perspective, neither the legislature nor the private sources which fund medical schools have shown any inclination to provide the massive resources necessary for a doubling, let alone a six-fold increase in the medical school population.

Increased and more aggressive recruiting of minorities is also a flawed approach. Recruiting of this type

is the very cornerstone of *present* special admissions programs. Simply increasing the number of minority applicants will do little, if anything, to increase the likelihood of their admissibility for, as discussed immediately before, the relative gap between performance of minority and majority groups under traditional criteria would remain. Also, because most medical schools aggressively recruit minorities, the "economics of the marketplace" operates to place a general ceiling on the "qualifications" of minority candidates. If the court will excuse a disgression into stereotyping, this concept can be illustrated briefly. Minority applicants, like all others, will apply to and attend the "best" institution available to them. Consequently, it has often been observed that the minorities admitted under special or disadvantaged programs at Yale or Harvard, just to cite two prestigious institutions, possess "qualifications", as measured by traditional criteria, that would place them among the top or elite if they chose to attend a local but far less known and prestigious institution of higher learning. Of course, the foregoing analysis might also suggest that if all of the major or prestigious institutions were to eliminate, or be forced to eliminate, their special admissions programs, then that narrow class of minority applicants who would otherwise have gained admittance would still be able to attend the smaller and less known institutions as regular admittees. That was not the point of our postulation, and it would result in a near complete exclusion of minorities from the major educational

institutions of the United States—a result we think best quickly rejected.

The third alternative proposed by the California Court is that of revamping special admissions programs to focus on the "disadvantaged" and use of "more flexible" admission standards. Initially, it should be noted that this approach is markedly similar to what the university claimed it was in fact doing. Ignoring that irony though, it should be clear that if the compelling state interest is that of ethnically integrating the medical school and of insuring meaningful access to the medical profession for ethnic minorities, this alternative may well ignore that interest. If simple economic status is equated with disadvantage, then non-minority persons are for that purpose subject to "special" consideration and because of their numerical superiority within the class of economically disadvantaged are likely to predominate and even completely fill the special admissions positions. If the previously described purpose of the program is to be addressed, then ethnicity must somehow be considered, and the declared reliance on disadvantaged status or other "flexible" admission factors becomes highly misleading.

As they stand, voluntary affirmative action programs or selection programs that have a carefully limited preferential factor are the backbone of meaningful progress in many areas of civil rights accomplishment. Court orders and executive or governmental agency mandates may be the cutting edge of change, but all recognize that voluntary actions represent the

fruit and goal of these efforts. Without them the full range of opportunities for ethnic minorities will be unnecessarily and perhaps irreparably delayed.

Finally, we feel compelled to express our apprehension for the future of voluntary remedial selection programs which contain preferential elements only limitedly distinguishable from or based on ethnicity. Such programs, we believe, play an important and presently necessary role. We suggest they are and should be permissible where they:

(1) are only applied in a context of a relevant historical disadvantage to an identified group or class;

(2) are temporary in nature;

(3) are fairly and uniformly applied under their own terms and detail;

(4) operate to select from among those meeting valid and necessary threshold qualification criteria for the opportunity or position;

(5) are not in irreconcilable conflict with vested rights;

(6) are carefully drawn and limited so as to minimize the impact on individuals of the historically advantaged group; and

(7) are not applied to afford any absolute or near absolute preference to any given individual, except where actual individual victims of invidious discrimination are identified and no conflict with vested rights is present.

When these circumstances are met, then we feel voluntary special selection programs are proper and permissible.

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of the State of California should be reversed or in the alternative remanded to reopen the record for supplementation and consideration in light of the issues discussed within this brief.

Respectfully submitted,

CHARLES E. WILSON,
LEONORA M. STOPOL,
FERNANDO GARCIA,
WILLIAM H. HASTIE, JR.,
Fair Employment Practice Commission,
Post Office Box 603,
San Francisco, California 94101,
Attorneys for the Amicus Curiae.

Dated, June 1, 1977.